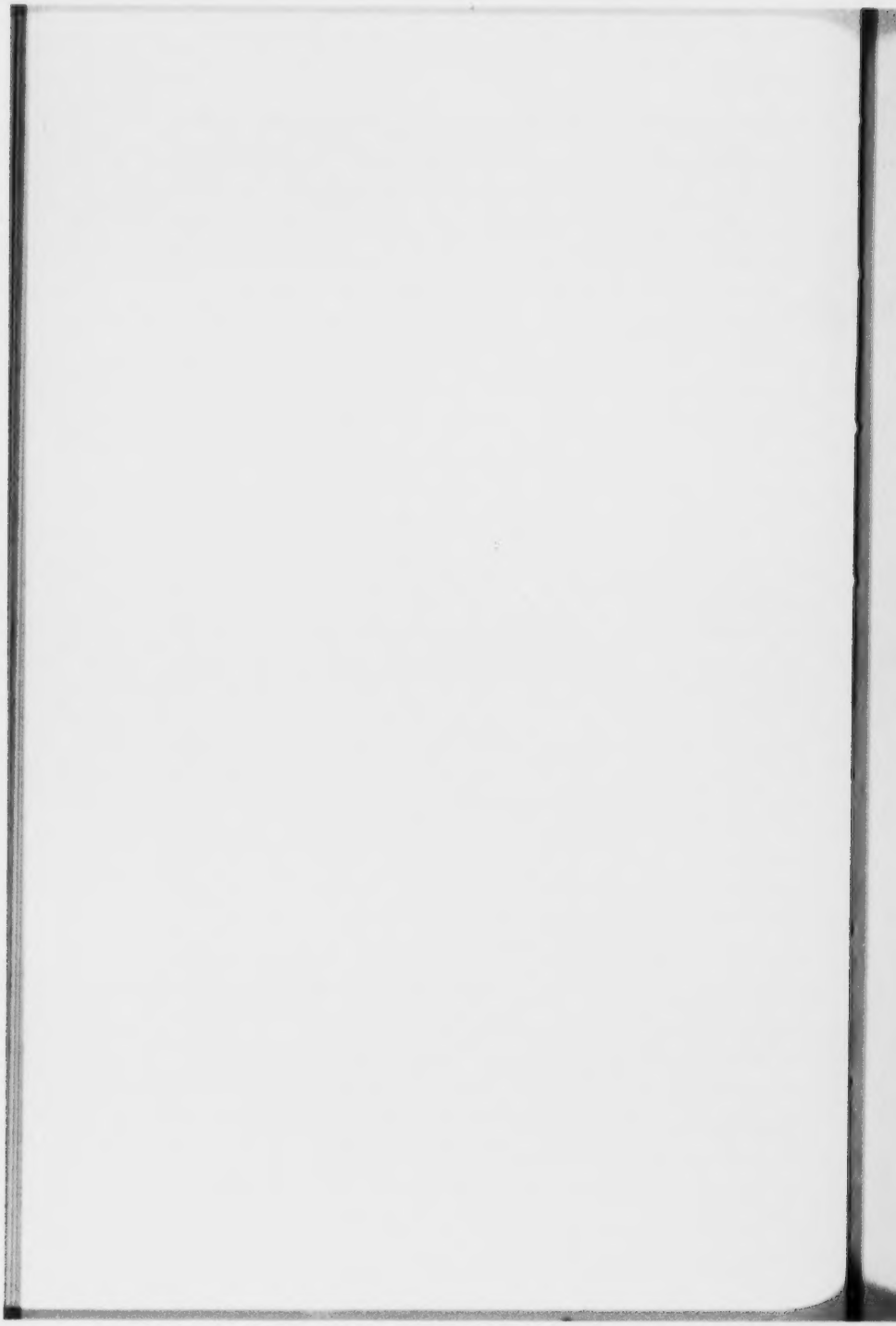

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 702

W. C. PHILLIPS AND FRED J. DAY, JR., Trustees,
Petitioners,

v.

GEORGE WALTER BAKER AND MODERN PRECOOLING COMPANY, a partnership,
Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

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SUMMARY STATEMENT OF THE CASE

The summary statement of the case by petitioners, at page 5 of their brief, should be amplified by pointing out that the agreed statement of facts to be found on page 6 of the record discloses that respondents

maintain an office at Plant City, Florida, which is their sole and only office; that they also maintain a post office box in the United States Post Office at Plant City, Florida, and that they maintain no other office or offices; and that all of their letterheads contain the above Post Office address and Post Office box, as do all their business cards, and that the only way a shipper can contact the respondents when such shipper is not in direct personal touch with them is through the Plant City, Florida, office, and that all of the customers of respondents do have direct relations with such Plant City, Florida, office.

It is also shown by the agreed statement of facts that the respondents carried on in the District of Florida the same acts charged by petitioners to be an infringement of the patents in suit.

ARGUMENT

SUMMARY OF THE ARGUMENT

Point A: Neither of the reasons relied upon for allowance of the writ is of that special and important character set forth in Supreme Court Rule 38.5 (b) sufficient to warrant the granting of the writ.

Point B: The Circuit Court of Appeals interpreted Rule 12 of the Federal Rules of Civil Procedure according to the plain import and reading thereof.

Point C: The Circuit Court of Appeals decided the question of venue according to the controlling

weight of authority, and its decision is not in conflict with any other decision of any other Circuit, nor with any applicable decision of this Court.

POINT A

Neither of the reasons relied upon by petitioners in support of their petition is sufficient to warrant this Court in granting the writ, as neither of them fall within the category of reasons enumerated in subdivision 5 (b) of Supreme Court Rule 38 or any reasonable extension thereof.

Interpretation of Federal Rules of Civil Procedure, Rule 12.

Petitioners have not shown that the interpretation of Rule 12 of the Rules of Federal Procedure is in conflict with the plain language and import of that rule, or in conflict with any other decision interpreting the rule.

Interpretation of United States Code, Title 28 Sec. 109.

In deciding the question of venue, the Court merely followed the doctrine of the accepted weight of authority as discussed in its opinion, and the petitioners have not shown that its decision in that regard is in conflict with the decision of any other Circuit Court of Appeals, or in any way in conflict with any applicable decision of this Court.

Furthermore, the decision of the question of fact involved in the instant case on the question of venue does not present a sufficiently important question as to engross the attention of this Court, or to call for an exercise of the discretion of this Court.

POINT B

The Circuit Court of Appeals interpreted Equity Rule 12 according to the plain import of the language of the rule.

Subdivision (b) of Rule 12 gives to a defendant the option of raising the defense of improper venue either by motion, *or* in the answer. Subdivision (e) grants to the defendant the right to obtain by motion a more definite statement of the charge in the complaint in order "to enable him to prepare his responsive pleading or to prepare for trial". Subdivision (g) of the rule makes provision for the joining of all available motions permitted by Rule 12, and for the obvious purpose of avoiding forced delays prohibits bringing by separate motion any of the omitted defenses which were theretofore available; but this subdivision does not forbid one to raise in his answer any of the omitted defenses. Subdivision (h) provides that any defense not raised either by motion *or* in the answer, shall be deemed to be waived.

Obviously, therefore, all that Rule 12 (h) provides is that any defense optionally permitted to be made by motion, and which is not raised *either* by *a motion or* by *answer,* will be deemed to have been waived.

However, in the instant case, *no* defense was raised by motion. The respondents merely availed themselves of the provisions of Subdivision (e) of Rule 12 to obtain a bill of particulars from which to ascertain the nature of the charge of infringement made against them before formulating their answer.

Having thus ascertained the character of the charge, respondents then prepared and filed their answer and elected to therein plead the defense of improper venue.

Petitioners say that because of this, and because respondents did not raise such defense by motion at the time they took the wholly preliminary step of moving for the bill of particulars, that they waived their privilege of such defense under the provisions of Rule 12 (h).

Such an interpretation would render nugatory the optional privilege as to the pleading of the defense, and particularly as in the instant case, it would render nugatory respondents' right to defer answer containing such defense until they had first determined the nature of the charge in the bill of complaint as provided for in Rule 12 (e).

POINT C

The Circuit Court of Appeals decided the question of venue in strict accordance with the weight of authority as cited and discussed in its able and well

considered opinion set forth at pages 20 to 30 of the record, which citations will not be repeated here.

Petitioners have in no way attacked the controlling weight of these authorities or pointed out any reason why the same should not be controlling in the instant case. Petitioners merely argue the broad question of the probable impossibility of securing jurisdiction over a wholly transient defendant, and ask this Court to assume the burden of using this action as the vehicle in which to decide this wholly abstract question, but which is not in point here.

In the instant case, the petitioners have available a District—that is, the Judicial District of Florida—where it could have secured complete jurisdiction over respondents, and long before this would undoubtedly have been able to secure an adjudication of this case on its merits, had they seen fit to proceed in the usual correct and orderly manner provided for in the statute.

CONCLUSION

The well considered decision of the Circuit Court of Appeals for the Ninth Circuit is manifestly correct. It is in accord with the applicable decisions of this Court, and is not in conflict with the decisions of any other Circuit Court of Appeals. The adjudication on the question of venue involves merely the application of well settled rules of law to facts peculiar to this case. It presents no question of general importance or any other of the usual or recognized grounds

for certiorari. Consequently, the petition presents no matter worthy of review in this Court, and should be denied.

Dated: Stockton, California, November 5, 1941.

Respectfully submitted,

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WEBSTER & WEBSTER,
Of Counsel.